(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUL 26 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel M Incio
for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as a "Community Health Manager," pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by an Application for Permanent Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor (DOL). The director determined that the University in California – the institution that awarded the beneficiary the degree of Master of Science in International Business in 2011 – has not been accredited by an accrediting agency recognized by the U.S. Department of Education (DOE). Therefore, the beneficiary's degree from did not entitle her to the requested classification and did not meet the educational requirements on the ETA Form 9089.

On appeal, counsel states that has been granted institutional approval under California state law, and was approved to enroll international students by the Department of Homeland Security (DHS). According to counsel, therefore, a Master of Science in International Business degree from should be accepted by U.S. Citizenship and Immigration Services (USCIS) as a valid degree. Counsel includes copies of previously submitted documentation in support of the appeal.

The ETA Form 9089 in this case was accepted for processing by the DOL on August 8, 2012, and certified by the DOL on October 11, 2012. The Form I-140, Immigrant Petition for Alien Worker, was filed on December 7, 2012. Documentation submitted with the petition included academic records from showing that the beneficiary was awarded the degree of Master of Science in International Business on March 18, 2011, after completing seven semesters of coursework.

In a request for evidence (RFE) issued on December 12, 2012, the director cited information from the DOE database that is not an accredited institution. In response to the RFE, counsel for the petitioner submitted documentation showing that has been granted institutional approval by the State of California's Bureau for Private Postsecondary and Vocational Education (BPPVE) and its successor organization, the Bureau for Private Postsecondary Education (BPPE), in accordance with the provisions of the California Education Code (Cal. Ed. Code).[1] Counsel submitted a photocopied document from the BPPE confirming that currently has "Approval" for four degree programs, including the Master of Science in International Business.

As further evidence of institutional status, counsel submitted a letter from Student Advisor, who indicated that is certified by the DHS under the Student Exchange and Visitor Program (SEVP) to enroll foreign students.

[1] In 2010, the Private Postsecondary Education Act of 2009 replaced the BPPVE with BPPE.

The director denied the petition on March 7, 2013, finding that has not been accredited by an organization recognized by the DOE. The director concluded that the beneficiary's Master of Science in International Business from is not sufficient to make her eligible for classification as an advanced degree professional under the Act or to meet the educational requirements of the offered position as set forth on the labor certification

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record.

The first issue to be examined in this proceeding is whether the beneficiary's Master of Science in International Business from is an "advanced degree" as required for classification as a member of the professions with an advanced degree under section 203(b)(2) of the Act.

At the outset, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS [the Immigration and Naturalization Service, the predecessor to USCIS]. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.[2] The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive

[2] Section 203(b)(2) of the Act also provides immigrant classification to aliens of exceptional ability. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

> experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The AAO will not consider a degree from an unaccredited college or university to satisfy the definition of an advanced degree. As stated by the DOE on its website:

> The [DOE] does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking [recognition must meet the] procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register* . . .
>
> The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.
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> [T]he practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.
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> . . . Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees.

See www.ed.gov/print/admins/finaid/accred/accreditation.html (accessed July 17, 2013).

The DOE's purpose in ascertaining the accreditation status of U.S. colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

> Presidents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions . . .

> CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.
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> Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community . . . The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort.

See www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf (accessed July 17, 2013).

The DOE and CHEA recognize six regional associations that accredit U.S. colleges and universities. One of these is the Western Association of Schools and Colleges (WASC), Accrediting Commission for Senior Colleges and Universities – whose geographical scope includes California, Hawaii, and other U.S. possessions in the Pacific, and whose membership represents a broad range of public and private schools in the region and other education-related organizations. The WASC website includes a list of all the higher educational institutions in its jurisdiction that are either accredited or candidates for accreditation. California, does not appear on that list. *See* www.wascsenior.org/apps/institutions (accessed July 17, 2013). Thus, has not been accredited by the applicable accrediting agency recognized by the DOE and CHEA – the WASC's Accrediting Commission for Senior Colleges and Universities – and there is no evidence that has requested accreditation by that agency.

The state of California acknowledges the qualitative difference between accredited and unaccredited educational institutions. The California Postsecondary Education Commission (CPEC), the state's planning and coordinating body for higher education from 1974 to 2011,[3] includes the following language regarding the "benefits associated with accreditation" on its website:

> Both the federal government and the states use accreditation as an indication of the quality of education offered by American schools and colleges.

[3] The CPEC ceased operations on November 18, 2011, after its funding was eliminated. *See* http://www.cpec.ca.gov (accessed July 17, 2013).

> At the federal level, colleges and universities must be accredited by an agency recognized by the United States Secretary of Education in order for it or its students to receive federal funds.
>
> At the state level, California allows colleges and universities that are accredited by the Western Association of Schools and Colleges (the recognized regional accrediting agency for California) to grant degrees without the review and approval of the Bureau for Private Postsecondary Education (BPPE). A list of approved institutions is available at the California Bureau for Private Postsecondary Education (BPPE).
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> In some states, it can be illegal to use a degree from an institution that is not accredited by a nationally recognized accrediting agency, unless approved by the state licensing agency. This helps prevent the possibility of fraud . . .

See www.cpec.ca.gov/CollegeGuide/Accreditation.asp (accessed July 17, 2013).

The CPEC website goes on to warn about state laws in Illinois, Indiana, Maine, Michigan, Nevada, New Jersey, North Dakota, Oregon, Texas, and Washington regarding degree/diploma mills. *See id.*

The qualitative difference between accredited and unaccredited educational institutions, acknowledged by the CPEC, is also recognized by the State of California in its Education Code. Cal. Ed. Code section 94813 defines "accredited" as follows:

> "Accredited" means an institution is recognized or approved by an accrediting agency recognized by the United States Department of Education.

With respect to unaccredited institutions that are approved to operate in California, Cal. Ed. Code section 94817.5 provides the following basic definition:

> "Approved to operate" or "approved" means that an institution has received authorization pursuant to this chapter to offer to the public and to provide postsecondary educational programs.

Cal. Ed. Code section 94887 sets the following guideline for the BPPE's grant of an approval to operate:

> An approval to operate shall be granted only after an applicant has presented sufficient evidence to the bureau [BPPE], and the bureau has independently verified the information provided by the applicant through site visits or other methods deemed appropriate by the bureau, that the applicant has the capacity to satisfy the minimum operating standards . . .

Accreditation is intended "to assure academic quality and accountability" (CHEA) and to provide "a reasonable assurance of quality and acceptance by employers of . . . degrees" awarded by the accredited institutions (DOE). Moreover, the imprimatur of a regional accrediting agency guarantees that a school's degrees will be recognized and honored nationwide. By comparison, an approval to operate by California's BPPE is a lower level endorsement that an educational institution "has the capacity to satisfy the minimum operating standards" (Cal. Ed. Code section 94887) with no guarantee that degrees awarded by that school in California will be recognized and honored nationwide.

The Act is a federal statute with nationwide application. The regulations implementing the Act – including 8 C.F.R. § 204.5(k)(2) defining "advanced degree" for the purposes of section 203(b)(2) of the Act – also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an "advanced degree" includes "any **United States academic or professional degree** . . . above that of baccalaureate" (or a foreign equivalent degree), "[a] **United States baccalaureate degree**" (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master's degree), and "a **United States doctorate**" (or a foreign equivalent degree). (Emphases added.) Similarly, "professional" is defined in 8 C.F.R. § 204.5(l)(2) as "a qualified alien who holds at least a **United States baccalaureate degree**" (or a foreign equivalent degree). (Emphasis added.) The repeated usage of the modifier "United States" to describe the different levels of (non-foreign) degrees makes clear the intention of the rulemakers that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis. The only way to assure nationwide recognition for its degrees is for the educational institution to secure accreditation by a regional accrediting agency approved by the DOE and CHEA.

For an educational institution in California, the regional accrediting agency is WASC's Accrediting Commission for Senior Colleges and Universities. As previously discussed, the school that issued the beneficiary's degree – California – is not on the WASC list of accredited institutions. Nor is listed as a candidate for accreditation. Accordingly, the beneficiary's Master of Science in International Business from cannot be deemed to have nationwide recognition. Therefore, it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).

Counsel's claim that the beneficiary's degree from should be accepted as an advanced degree because the DHS has approved the school for attendance by foreign students is not persuasive. The approval of an institution for attendance by foreign students in F-1 nonimmigrant visa status[4] is unrelated to the requirements for classification as an advanced degree professional. A broad range of educational institutions are eligible for attendance by foreign students, including community colleges, junior colleges, seminaries, conservatories, high schools, elementary schools, and institutions which provide language training, instruction in the liberal arts or fine arts, and/or instruction in the professions. *Id.*

[4] *See* 8 C.F.R. § 214.3.

Based on the foregoing analysis, the AAO determines that the beneficiary is not eligible for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(2). Thus, the petition cannot be approved.

The next issue to be examined in this proceeding is whether the beneficiary's Master of Science in International Business meets the minimum educational requirements of the offered position set forth on the ETA Form 9089.

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification – "Job Opportunity Information" – describes the terms and conditions of the job offered. In this case, Part H, lines 4 and 4-B of the labor certification state that the minimum educational requirement to qualify for the proffered position is a master's degree in business administration or a related field. Lines 5 and 6 state that no training or experience in the job offered is required. Lines 7s and 7-A indicate that a master's degree in health administration or a medically related field is acceptable as an alternate field of study. Line 8 states that no alternate combination of education and experience is acceptable. Line 9 states that a "foreign educational equivalent" is acceptable.

The beneficiary does not meet the above requirements. As previously discussed, the beneficiary's degree from California, although called a Master of Science in International Business, does not qualify as a U.S. master's degree in international business because it was not awarded by an educational institution that has been accredited by a regional accrediting agency recognized by the DOE and CHEA. Nor does the beneficiary have a foreign educational equivalent to a master's degree in international business. Since the beneficiary does not fulfill the educational

requirements in Part H of the labor certification, she does not qualify for the job offered. For this reason as well, the petition cannot be approved.

Although not noted by the director in the decision issued on March 7, 2013, the record lacks evidence as to whether the petitioner possesses the continuing ability to pay the proffered wage to the beneficiary since the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In the instant case, the ETA Form 9089 was accepted on August 8, 2012. The proffered wage as stated on the ETA Form 9089 is $75,858.00 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The petitioner made no claim to have employed the beneficiary and did not submit any evidence reflecting that it had ever paid any wages or compensation to the beneficiary. The petitioner did not submit tax returns, annual reports, or audited financial statements covering the period from the priority date. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, the AAO finds that the petitioner has failed to establish that it has had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.